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PAULEY PETERSEN & ERICKSON 2800 WEST HIGGINS ROAD HOFFMAN ESTATES, IL 60195			REICHLE, KARIN M	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/855,180
Filing Date: May 14, 2001
Appellant(s): BOGGS ET AL.

MAILED
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Group 3700

Maxwell J. Petersen
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 02-09-05 appealing from the Office action mailed 6-10-04.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

No evidence is relied upon by the examiner in the rejection of the claims under appeal.

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Language Interpretation

Various claim terms have been defined on page 6, line 4-page 14, line 21. All other terminology will be given its common meaning, i.e. dictionary definition. For example, “opposite” is defined as “placed or located directly across from something else or each other; opposite sides of a building”. It is noted that the language “targeted elastic laminate” as defined on the pages cited supra and used in claims 2-3 and 26 defines a product by process, see MPEP 2113, (i.e. even though product by process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process). It is further noted that the end product claimed is a garment not a targeted elastic material, i.e. if a garment of the prior art is the same as the end product in the claims, the claims are unpatentable even though it was not made in a single manufacturing process but rather through separate manufacture and subsequent connection. “Joined” and “bonded” are defined as commonly used, i.e. include direct or indirect joining or bonding. See also Response to Arguments section below. “Layer” is defined as commonly used, i.e. “One thickness, course or fold laid or lying over or under another”.

Ground 1):

Claims 1-5, 12, 15-19 and 25-26 are rejected under 35 U.S.C. 102(b) as being anticipated by 3M, PCT '264.

See Figures, esp. Figures 5, 8 and 14, page 4, line 15-page 5, line 3, page 7, lines 6-23, page 11, lines 19-31, page 16, lines 24 et seq, page 17, lines 1-7, page 21, line 22-page 24, line 14, and page 27, lines 24-26 of 3M, i.e. the high tension/low stretch zone is adjacent edge 74 while the low tension/high stretch zone is in the midportion as seen in Figure 14. As best understood of the instant specification at page 2, last paragraph, page 3, lines 8-14 as amended, the definitions on page 7, lines 9-17, and the manufacturing processes of Figures 9-12 and 16, the device as set forth by 3M is made in a single manufacturing process. With regard to claims 1 and 25, Appellant claims a barrier layer having a first surface facing an inner surface of the garment and a second surface opposite the first surface facing an outer surface of the garment and at least one second filament joining the first surface and another second filament joining the second surface. It is noted that the claims do not require that the filaments be directly joined to the respective surfaces of the barrier layer, see the Claim Language Interpretation section *supra*. Therefore, since 3M shows a barrier layer 72 having two opposite inner and outer surfaces with at least one second filament directly joined to an inner surface and another second filament indirectly joined to the outer surface such meets the claim language. See also the Response to Arguments section *infra*.

In regard to claim 2, the first facing layer is 76.

In regard to claims 12, 15-16 and 19, the reference teaches a device which functions as set forth in claims 12, 15-16 and 19, see page 1, lines 8-9 of 3M.

Art Unit: 3761

In claims 17-18, Applicant claims the device being swimwear or a feminine hygiene article which capability or function the reference does not explicitly teach. However, the 3M patent teaches all the claimed structure. Therefore there is sufficient factual evidence for one to conclude that the same structure of the 3M device would also be capable inherently of the same properties and functions of such claimed structure. See MPEP 2112.01.

Ground 2):

Claims 6 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over 3M '264 in view of Kimberly Clark EP '550.

Applicant claims a second facing layer bonded to a second side of the zones, i.e. the first facing layer is attached to a first side of the zones. See Figure 14, element 72, page 23, lines 14-19 and page 6, lines 7 et seq of 3M, i.e. the zones have a barrier or backsheet on one side and a facing layer on the other. See KC '550 at page 4, lines 40-55, i.e. interchangeability of a two ply barrier for a one ply barrier. To make the one ply film barrier of 3M a two ply, inner film ply/outer ply nonwoven web barrier instead would be obvious to one of ordinary skill in the art in view of the recognition of the interchangeability as taught by KC '550. In so doing the outer ply would be a second facing layer on the second side of the zones.

(10) Response to Argument

Ground 1):

Appellant's arguments on pages 3-5 have been considered but are deemed not persuasive. Specifically, Appellant argues that 1) '264 only teaches a multiplicity of filaments joined to a

Art Unit: 3761

single surface of a substrate, i.e. there are no filaments joined to an opposite surface, and 2) to interpret the independent claims as equating the phrases “joined to the first surface” with “joined to the second surface” with no differentiation between the two limitations, improperly disregards the claimed distinction between the first and second surfaces. However, with regard to 2), even though “joined to” has been interpreted as not having to mean “directly joined to”, i.e. can include direct or indirect joining, it does not mean that the phrases discussed supra were treated equally, i.e. given no differentiation and the distinction between the surfaces was disregarded. The phrase “joined to a first surface” applied with regard to one of the filaments was treated as requiring that one filament is joined directly or indirectly to the first surface while the phrase “joined to the second surface” applied with regard to another filament was treated as requiring that other filament is joined directly or indirectly to the second surface. These are not equal treatments. However, the differentiation and distinction between the surfaces did not require the reading of the claim terminology “joined to” be limited to direct joining only. With regard to 1), attention is reinvited to Figure 14, page 21, line 22-page 24, line 14, Figure 5 and Figure 8 of ‘264 cited in the prior art rejection, which teach a layer 72, i.e. composite 30, and a strand 16 closest to the viewer which will be considered “the at least one of the elastomeric second filaments” and an adjacent filament 16 which will be considered the “at least another one of the elastomeric filaments”. The one filament 16 is joined to a surface of barrier layer 72 facing the inner or outer surface of the garment, i.e. one of the inner and outer opposite surfaces of portion 32 and portion 12, e.g. directly to the inner surface of portion 32 and outer surface of portion 12 and indirectly to the outer surface of portion 32 and the inner surface of portion 12, and the another filament 16 is joined to a second opposite surface of barrier layer 72 facing the outer or

Art Unit: 3761

inner surface of the garment, i.e. one of the outer and inner opposite surfaces of portion 32 and portion 12, e.g. directly to the outer surface of portion 12 and inner surface of portion 12 and indirectly to the inner surface of portion 32 and the outer surface of portion 12. For one example, the one strand 16 is joined to a surface of the barrier layer which faces the inner surface of the garment, i.e. the inner surface of 32, and the another strand 16 is joined to the another surface of the barrier layer which faces the outer surface of the garment, i.e. the outer surface of the portion 12. For further example, the one strand 16 is joined to a surface of the barrier layer which faces the inner surface of the garment, i.e. the inner surface of 32, and the another strand is joined to a surface of the barrier layer which faces the outer surface of the garment, i.e. the outer surface of 32 (albeit indirectly). Therefore the '264 reference clearly teaches a multiplicity of filaments joined to more than a single surface of a substrate.

Therefore, the rejection of the claims under 35 USC 102 is maintained as proper.

Ground 2):

Appellant's arguments on page 6 have been considered. Since Appellant only relies on the reasons already discussed supra with regard to Ground 1 and does not specifically point out why the combination of references applied in the rejection is improper, such arguments are deemed not persuasive for the reasons set forth in Ground 1 supra.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

Art Unit: 3761

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


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